

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Darius Mostowfi, et al.,  
Plaintiffs,

No. C 03-5784 VRW (WDB)  
ORDER FOLLOWING JULY 7,  
2005, DISCOVERY HEARING

v.

i2 Telecom International, Inc., et  
al.,  
Defendants.

On July 7, 2005, the Court conducted a discovery hearing in connection with plaintiffs' motion to compel production of documents, filed June 28, 2005. Naren Chaganti, Esq., appeared on behalf of plaintiffs. Byron S. Hollins, Esq., appeared on behalf of the 'attorney defendants'.<sup>1</sup> Kathryn Diemer, Esq., appeared on behalf of the 'i2 Telecom defendants'.

For reasons articulated more thoroughly on the record, the Court ORDERED as follows:

\_\_\_\_1. Plaintiffs' counsel confirmed that he is NOT seeking sanctions in connection with his motion to compel. The Court will not impose sanctions in connection with this motion.

<sup>1</sup> Mr. Chaganti and Mr. Hollins appeared via telephone.



1 review the documents and produce to plaintiffs any documents whose confidential  
2 status has not been maintained.

3 8. To facilitate the resolution of doubts in favor of disclosure, the Court  
4 hereby ORDERS that defendants will NOT be deemed to have waived any privileges  
5 or protections that otherwise attach to an arguably protected document by virtue of  
6 their disclosure of that document to plaintiffs. Defendants should mark with an  
7 asterisk each arguably protected document that they disclose to plaintiffs' counsel.

8 Documents so marked are to be reviewed only by counsel for plaintiffs and are  
9 to be used only for the purposes of this case. Defendants may draft a confidentiality  
10 agreement (or amend a previously existing one) to so provide.

11 9. Plaintiffs seek a ruling from this Court that various documents withheld  
12 from production by the 'attorney defendants' and the 'i2 Telecom defendants' as  
13 protected by the attorney-client privilege or work product doctrine are not so  
14 protected and therefore must be produced to plaintiffs. The parties have not provided  
15 the Court with sufficient information to rule on these complex attorney-client  
16 privilege and work product disputes. If plaintiffs want the Court to resolve such  
17 issues, they MUST follow the procedure described below:

18 Plaintiffs' counsel must review defendants' privilege logs to identify those  
19 documents which are significant to plaintiffs' case. In written correspondence to  
20 defendants, plaintiffs must identify each such document by Bates number. With  
21 respect to each identified document, plaintiffs must either (i) provide evidence (direct  
22 or circumstantial) that the privileged or protected designation is erroneous, or (ii)  
23 make a good-faith argument, supported by legal authority and specific facts, that the  
24 defendants have not made a prima-facie showing that the document is protected.

25 After reviewing each identified document and considering any additional  
26 circumstances relevant to that document's protected status, **and in no case later than**  
27 **two weeks after receipt of plaintiffs' correspondence**, defendants must either (i)  
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1 re-designate the document as not protected and produce it forthwith to plaintiffs, (ii)  
2 designate the document as arguably protected pursuant to the procedure outlined  
3 above and produce it forthwith to plaintiffs, or (iii) set forth, in written  
4 correspondence, all facts and legal authority upon which defendants base their  
5 position that the document is protected. Facts upon which defendants rely must be  
6 established by competent declaration.

7 If, after careful review, plaintiffs believe that defendants have withheld  
8 documents that are not protected from disclosure, plaintiffs may file a motion to  
9 compel. If plaintiffs contend that the Court should order documents produced  
10 pursuant to the crime/fraud exception to the attorney/client privilege, they **must** make  
11 the showing required under United States v. Zolin, 491 U.S. 554 (1989).

12 10. Subject matter jurisdiction in this case is predicated on claims arising  
13 under federal law. See Plaintiffs' Second Amended Complaint, filed June 13, 2005,  
14 ¶ 3. Accordingly, the Court will apply federal law to issues relating to the work-  
15 product doctrine. The Court will apply California's privilege law only if plaintiffs'  
16 counsel shows us that the documents sought are relevant only to a state law claim or  
17 claims.

#### 18 Specific Document Requests

19 11. The 'i2 Telecom defendants' must produce all i2 Telecom bank statements  
20 from the period of January 1, 2002, to June 30, 2003.

21 12. Defendants must produce all records within their custody or control that  
22 relate to or reflect defendants' contention that Lew Lim owed defendants  
23 approximately \$495,000 in "undisclosed liabilities" on or about June 30, 2003.  
24 Defendants must also produce all documents that reflect whether Lew Lim paid all  
25 or a portion of these "undisclosed liabilities" (directly or otherwise).

26 Ms. Diemer must continue her efforts to acquire the 'Stressor/Leimbach'  
27 documents. Ms. Diemer must also confirm, if possible, how Stressor & Associates  
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1 and Mr. Leimbach acquired the pertinent information and documents, and whether  
2 additional responsive information and/or documents might be retrieved from some  
3 other source. After ascertaining the extent of Stressor & Associates/ Leimbachs'  
4 records and informational base, defense counsel must also ask defendants Arena,  
5 Kossar, Zalenski, and Roberts whether they have any additional responsive  
6 documents.

7 13. Defendants must provide a reliable financial statement for Mr. Kossar for  
8 the years 2002 and 2003. Mr. Kossar's investments may be listed by category, i.e.  
9 'equity investments : \$5 million dollars'. Plaintiffs' counsel may **NOT** show this  
10 financial statement to his clients. In addition, to the extent that the financial  
11 statement lists specific companies or particular people, plaintiffs' counsel is not  
12 permitted to contact those companies or people unless he obtains consent from  
13 defendants' counsel or from the court after an opportunity for defense counsel to  
14 object.

15 14. Counsel for the 'attorney defendants' clarified that the document Bates-  
16 stamped 'RAM 1755' is a memo created by the Hollins law firm that was Bates-  
17 stamped in error and included in the attorney defendants' privilege log only to avoid  
18 the appearance of a 'gap' in Bates-stamped documents.

19 15. Except as otherwise discussed above, defendants must produce all  
20 discoverable documents that are responsive to the remainder of the document requests  
21 contained in plaintiffs' Local Rule 37-2 separate statement.

22 16. At this juncture, plaintiffs are only entitled to one reliable set of  
23 documents in response to each request for production of documents. Accordingly,  
24 the Court requires 'the attorney defendants' to produce only responsive documents  
25 within their custody or control that have not already been produced by other  
26 defendants.

1 \_\_\_\_\_ 17. The following deadlines apply to the documents referenced in paragraphs  
2 eleven through sixteen, above. **By Monday, July 25, 2005**, defendants must produce  
3 as many of the documents as possible. **By Monday, August 8, 2005**, defendants  
4 **must** complete the document production.

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7 \_\_\_\_\_ At the conclusion of the discovery hearing, plaintiffs' counsel asked the Court  
8 to compel various of the defendants to produce their computer hard-drives. Plaintiffs  
9 may be entitled to the production of discovery from an electronic source or in  
10 electronic form. The Court will not, however, rule on this issue in the absence of  
11 briefing from both sides.

12 If plaintiffs' counsel wishes to pursue 'electronic source' discovery, he **MUST**  
13 first meet and confer with opposing counsel regarding this issue. Only if this meet  
14 and confer effort is unsuccessful may plaintiff file a motion to compel. The Court  
15 also emphasizes that it will not require defendants to produce duplicative or irrelevant  
16 material.

17 IT IS SO ORDERED.

18 Dated: July 12, 2005

19 /s/ Wayne D. Brazil  
20 WAYNE D. BRAZIL  
21 United States Magistrate Judge

22 Copies to:  
23 All parties,  
24 WDB, VRW  
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